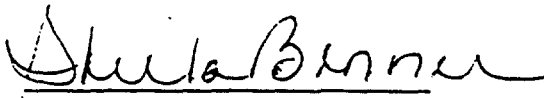


CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of July, 1996 served all parties to this action with a copy of the foregoing ANSWER TO SECOND SET OF INTERROGATORIES by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below:


Sheila Bonner

American Communications Services, Inc.
By Its Attorneys
Chip Yorkgitis
KELLEY DRYE & WARREN
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Catherine Seidel
Commission Counsel
Formal Complaints and
Investigations Branch
2025 M Street, N.W.
Washington, D.C. 20036

DUPLICATE

REDACTED VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AMERICAN COMMUNICATIONS
SERVICES, INC.

Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS,
INC.

Defendant.

File No. E-96-20

To: The Formal Complaints and
Investigations Branch

REPLY

American Communications Services, Inc. ("ACSI"), by and through its attorneys and pursuant to Section 1.726 of the Federal Communications Commission's Rules,¹ hereby replies to the Affirmative Defenses of the defendant, BellSouth Telecommunications, Inc. ("BellSouth")² in the above-captioned matter as follows:

1. In paragraph 1 of its Affirmative Defenses, BellSouth alleges that ACSI fails to state a cause of action under the Communications Act. In Reply thereto, ACSI states that

¹ 47 C.F.R. § 1.726 (1995). On April 25, 1996, an order was granted in this matter extending the time for filing this Reply through May 6, 1996.

² Answer of BellSouth (filed April 8, 1996) at 13-15.

Section 1.720(b) of the Rules, upon which BellSouth relies, requires that ACSI aver "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation." 47 C.F.R. § 1.720(b). In its Formal Complaint, ACSI included three counts and adequately pled each of them.

2. First, ACSI alleged that BellSouth violated Section 203(a) of the Act, which requires BellSouth to show in its tariff all charges for its interstate access services, as well as the classifications, practices, and regulations affecting those charges. 47 U.S.C. § 203(a). See Formal Complaint ¶¶ 17-28. ACSI averred, supported by non-tariffed documentation from BellSouth and an affidavit from ACSI's Director of Program Management, that the actual reconfiguration non-recurring charges ("RNRCs") that BellSouth is assessing for access channel termination location ("ACTL") moves cannot be accurately determined by reading BellSouth's tariff. As a result, in fact, parties have felt compelled to seek detailed explanations from BellSouth regarding the application of the tariffed charges to generic ACTL moves, as demonstrated by BellSouth authored letters attached to the affidavits accompanying ACSI's Formal Complaint. At a minimum, ACSI alleged, ACSI's tariff was unclear and ambiguous and thus must be interpreted against BellSouth and its continued practice of assessing multiple DS1 and DS0 RNRCs when DS3 circuits are moved.

3. Second, ACSI claimed that BellSouth had violated Section 201(b) of the Act and the FCC's *Expanded Interconnection* orders because its RNRCs are not just, reasonable, and cost-based. See Formal Complaint ¶¶ 29-40. In support thereof, ACSI averred the specific requirements of Section 201(b) and the *Expanded Interconnection* orders and, through the affidavit of ACSI's Director of Program Management, pled facts to support its

allegation that the RNRCs of BellSouth are not cost-based, as the *Expanded Interconnection* orders require.

4. Third, ACSI's last claim was that BellSouth applies its RNRCs in such a way as to violate the proscription against unreasonable discrimination present in both Section 202(a) of the Act and the FCC's *Expanded Interconnection* orders. Formal Complaint, ¶¶ 41-58. ACSI averred facts, supported by affidavits from its Director of Program Management and its Vice President of Carrier Sales, which if proven true would demonstrate that BellSouth charges customers reconfiguring their access facilities different total RNRCs in similar circumstances, and that any differences in RNRCs are *not* equal to the differences in the costs to BellSouth in the different circumstances of reconfiguration, as the *Expanded Interconnection* orders expressly require.

5. Thus, in sum, as required by the Commission's rules, ACSI has averred facts which if proven true, would constitute violations of Sections 201, 201(b), 202(a), and of the Commission's *Expanded Interconnection* orders. Accordingly, ACSI's Formal Complaint stated a cause of action and BellSouth's first Affirmative Defense should be denied.

6. In reply to paragraph 2 of BellSouth's Affirmative Defenses, wherein BellSouth requests that ACSI plead certain matters with more specificity, ACSI submits that BellSouth's request is, in essence, an untimely motion that the allegations in the Complaint be more definite and certain. *See* 47 C.F.R. § 1.727(b). Such motions were due within 15 days after service of the Complaint, in other words more than two weeks *before* BellSouth filed its Answer. *Id.* Hence, BellSouth's second Affirmative Defense is untimely and should be denied as procedurally defective.

7. By way of further reply to paragraph 2 of BellSouth's Affirmative Defenses, ACSI notes that, in order for the FCC to find that BellSouth's RNRCs violate Section 201(b), 202(a), or 203 of the Act and the *Expanded Interconnection* orders, it is not necessary for ACSI to demonstrate that BellSouth has actually charged those rates, as the defendant suggests. It is only necessary to ascertain that those are the RNRCs BellSouth would charge if a carrier were to order an ACTL Move, which is what ACSI has averred. If it were otherwise, the Commission would be powerless to suspend proposed tariffs of carriers subject to Title II regulation and find the rates therein unlawful, which it has done on repeated occasions. As explained further in the affidavit of Deborah Sellers, ACSI's Vice President of Carrier Sales, attached to this Reply, it is the case that ACSI has suffered most of its damages because of the RNRCs that BellSouth would have charged its IXC and other access customers had they reconfigured access facilities with ACSI. BellSouth never assessed those charges in those cases because the customers decided they would stay with BellSouth due to the excessiveness of the RNRCs, foreclosing the possibility that those RNRCs would be assessed.

8. By way of further reply to paragraph 2 of BellSouth's Affirmative Defenses, ACSI submits that its comparison in its Formal Complaint of BellSouth's Network Optimization Waiver ("NOW") program with the application of its RNRCs for ACTL moves

is valid. See Formal Complaint, ¶¶ 47-49. While BellSouth's defense is that the NOW program does not involve ACTL moves, the point of ACSI's comparison is that IXCs, using the NOW option, could in effect achieve what is, for all practical purposes, an ACTL move *without* the imposition of a reconfiguration charge. In these circumstances, it is completely appropriate for ACSI to make the comparison it did because the *Expanded Interconnection* orders require that any differences in reconfiguration charges that are applied be justified based on the differences in costs between two different types of reconfigurations. Otherwise, the reconfiguration charges are unreasonably discriminatory and not valid. See Formal Complaint ¶ 48.

9.

10. In reply to paragraph 4 of BellSouth's Affirmative Defenses, ACSI states that it has complied with the FCC's rules regarding its prayer for damages. Specifically, ACSI has "clearly and unequivocally request[ed] the recovery of damages," see 47 C.F.R. § 1.722(b)(2)(i), and reserved its rights to plead such damages with specificity in a Supplemental Complaint. See *id.* § 1.722(b). See also Formal Complaint ¶¶ 66, 69. By

way of further reply, ACSI has described the nature of the injury sustained by BellSouth's unlawful actions. *See, e.g.,* Formal Complaint, ¶¶ 28, 40, 57-66 (in some cases, ACSI suffered lost business opportunities and profits and, in other cases, higher costs and reduced profits due to assumption of BellSouth's excessive RNRCs in order to obtain business). By way of further reply, ACSI's Vice President of Carrier Sales has prepared a chart describing in detail some of ACSI's lost business opportunities as a result of BellSouth's excessive and unlawful RNRCs. *See* Declaration of Deborah Sellers, attached hereto, and Exhibits 1-3 thereto. Ms. Sellers' declaration and the exhibits attached hereto clarify that ACSI has on numerous occasions lost business opportunities or incurred unwarranted expenses directly attributable to BellSouth's RNRCs.

11. In reply to paragraph 5 of BellSouth's Affirmative Defenses, ACSI states that none of the relief it seeks in its Formal Complaint is barred by the statute of limitations set forth in Section 415 of the Communications Act. That Section set forth a two-year statute of limitations. 47 U.S.C. § 415. Neither the activity of which ACSI complains, nor the damages ACSI suffered as a result of BellSouth's practices, occurred during or after October 1994, the month in which ACSI began to market its services in BellSouth territory. Accordingly, BellSouth's fifth Affirmative Defense must be denied.


REDACTED VERSION

WHEREFORE, ACSI respectfully requests that each of BellSouth's Affirmative Defenses be denied and that ACSI's Prayer for Relief in its Formal Complaint be granted.

Respectfully submitted,

AMERICAN COMMUNICATIONS
SERVICES, INC.

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Its Attorneys

May 6, 1996

VERIFICATION

I, Riley M. Murphy, declare under penalty of perjury that the following is true and correct:

1. That I am Executive Vice President of Legal and Regulatory Affairs, General Counsel, and Secretary of American Communications Services, Inc.
2. That I have carefully read the foregoing "Reply," that I have personal knowledge of matters discussed therein, and, with the exception of those matters that are subject to judicial notice on the part of the Commission, find that the facts and representations stated therein are true and accurate to the best of my knowledge and belief.

Signed: 

Dated: May 5, 1986

CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of May, 1996, a true and correct copy of the foregoing *Reply* of American Communications Services, Inc. were served via first class mail to:

M. Robert Sutherland
Theodore R. Kingsley
BellSouth Telecommunications, Inc.
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